



The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty-- Again

The Supreme Court has made its first important race/sovereignty decision—call it the first race disaster—of the new millennium. Eric Yamamoto and Chris Iijima report from Hawai'i on *Rice v. Cayetano*'s effects on Native sovereignty, civil rights, human rights, and the telling of history itself.

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On February 23, the U.S. Supreme Court decided perhaps the most important Hawaiian case ever. In *Rice v. Cayetano*, the Court agreed with a white American rancher's claim that a Native Hawaiians-only voting limitation for trustees to the state's Office of Hawaiian Affairs (OHA) constituted unlawful racial discrimination.

In 1996, plaintiff Harold "Freddy" Rice, a Caucasian rancher who traces his family's roots in Hawai'i back to the mid-1800s, sued Hawai'i's governor, Ben Cayetano, to invalidate OHA's Native Hawaiians-only voting limitation. But underlying *Rice v. Cayetano* is a centuries-old battle over land, race, and rights.

OHA was created in 1978 by a state constitutional amendment adopted by an overwhelming vote of Hawai'i's multiracial populace. As Justice Stevens wrote in his dissent to *Rice*, Hawai'i's voters recognized that Native Hawaiians (*Kanaka Maoli*) "share with Native Americans" a "history of subjugation at the hands of colonial forces" and that *Kanaka Maoli* deserved a measure of self-governance. *Rice* now jeopardizes not only OHA; it also threatens all federal and state programs designed to repair continuing harm to the Native Hawaiian people resulting from the illegal U.S. overthrow of reigning Queen Lili'uokalani and the sovereign nation of Hawai'i in 1893.

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Campaign for a Color-Blind America, the right-wing legal foundation that financed the suit) praised the Court’s stand against “racial discrimination”—against whites.

Meanwhile, Native American leaders worried that the decision would encourage conservatives to attack Congress’ authority to deal with Native Americans not formally recognized as tribal members. Latinas/os—who are linking contemporary legal strategies on immigration, language, citizenship, and political participation with rights to self-determination and land stemming from the treaty that ended the U.S.-Mexico War of 1847—could also find their rights at risk. *Rice* signifies that the conservative retreat from justice continues for people of color, women, gays and lesbians, and the disabled.

A Battle Over Land

The Office of Hawaiian Affairs is a Native Hawaiian-controlled entity that, among other things, administers the so-called “ceded lands.” These lands were Native Hawaiian government and royal lands seized by the U.S. upon its annexation of Hawai‘i. They comprise almost two million acres—about one-third of the entire lands of Hawai‘i. When Hawai‘i became a state in 1959, the U.S. turned over most of the ceded lands to the state to be held in trust partially for the benefit of Native Hawaiians.

For years, the state failed to uphold this trust responsibility. Indeed, Hawaiian voters’ approval of the 1978 constitutional amendment to create OHA and its Native Hawaiians-only voting structure came partly as a response to the state’s mismanagement of the trust. Today OHA controls more than half a billion dollars in assets from the ceded lands, oversees the state’s use of ceded lands, and spends millions annually on programs addressing the social, economic, and cultural needs of *Kanaka Maoli*.

As the constitutionally designated “receptacle” for government reparations payments, OHA is seen by some *Kanaka Maoli* as a transitional entity toward sovereignty. Currently, the state is negotiating with OHA to transfer actual title to some land and to pay it over \$300 million as reparations and legal settlement for the state’s past malfeasance.

Civil Rights Short-Circuit Sovereignty

Freddy Rice claimed that OHA’s Native Hawaiians-only voting limitation constituted illegal racial discrimination against non-

The State of Hawaiʻi, OHA, virtually every major Native Hawaiian organization, and the U.S. government countered that the voting limitation was not a racial restriction in the traditional sense. Rather, they argued, it was an allowable limitation resulting from the U.S.'s recognition of its political relationship with its indigenous peoples, and the federal and state governments' history of affording them special protections.

The lower federal courts flatly rejected Rice's arguments and upheld OHA's voting limitation. They found, in effect, that Native Hawaiians, like Native Americans, should be allowed to hold elections restricted to Native Hawaiians as a form of limited self-governance. But the U.S. Supreme Court reversed course. A majority of seven justices held that the "race neutrality command of the Fifteenth Amendment" prevents a state from abridging "the right to vote on account of race, and [the OHA voting restriction] does so."

The *Rice* decision is perhaps the first time that the 15th Amendment has ever been invoked to protect the rights of a white male. Justice Anthony Kennedy, writing for the majority, pronounced that the voting limitation "demeans a person's dignity and worth [because it] judged by ancestry instead of by his or her own merit and essential qualities."

Native, but not Sovereign

The Kennedy majority turned a blind eye to history. Ignoring OHA's reparatory purpose and on-going federal efforts to rectify the illegal overthrow of the Native Hawaiian government, the opinion treated OHA's voting limitation as racial discrimination against non-Native Hawaiians. It ignored legal precedent allowing voting limitations for indigenous peoples, and numerous federal statutes which specifically describe Native Hawaiians as an indigenous people, concluding that OHA was not a "quasi-sovereign" entity and therefore not entitled to restricted voting.

The concurring opinion of Justice's Breyer and Souter went even further. It argued that "there is no 'trust' for Native Hawaiians here, and OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe."

In their dissent, Justices Stevens and Ginsburg excoriated the majority for its historically blind decision. "The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State

manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court’s federal Indian law, it is clear that Hawai`i’s election scheme should be upheld.”

But the Court majority in *Rice* appropriated the rhetoric of civil rights to sabotage the justice claims of subordinated Native Hawaiians. Claiming “reverse racism,” conservatives successfully attacked affirmative action for people of color on the continental U.S., and now with the *Rice* decision, they have succeeded in attacking a Native peoples’ movement toward political sovereignty.

At Stake: Collective Memory

What lay at the core of the Court’s decision was a battle of conflicting histories. Indeed, justice struggles through claims of right are, first and foremost, struggles over collective memory. How a community frames past events and connects them to current conditions often determines the power of justice claims—or opposition to them. Is OHA simply about conferring racial privileges, tilting an otherwise level U.S. playing field in favor of Native Hawaiians? Or is OHA part of concerted, long-term state and federal efforts to rectify the ravages of U.S. colonialism in which race, economics, and politics played major roles?

The Court’s decision grossly distorted the history of Hawai`i. Nowhere did it mention U.S. colonialism in 1898, in Hawai`i or in the Philippines and Puerto Rico. Nor did the Court acknowledge the destruction of Native Hawaiian culture through the banning of Hawaiian language, or the current effects of Native Hawaiian homelands dispossession: high rates of poverty, homelessness, and incarceration; and poor health and education indicators for *Kanaka Maoli*. The Court never specifically referred to whites, even though Rice’s claim was implicitly one of “reverse discrimination” against whites. And nowhere did the Court discuss the vibrant Native Hawaiian sovereignty movement that gave birth to OHA.

Perhaps most astonishing was the Court’s dismissive treatment of two hugely significant facts. First, there was little mention of the extraordinary U.S. Congressional Apology Resolution of 1993, in which the U.S. government acknowledged its complicity in the illegal overthrow of the Native Hawaiian government in 1893 and committed the U.S. to future acts of reconciliation. Second, the decision failed to mention that OHA and its voting limitation were created by an overwhelming vote of Hawai`i’s multiracial populace.

As Justices Stevens and Ginsburg observed in dissent, “It is a painful irony indeed to conclude that Native Hawaiian people are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them.”

Same Old Colonizer’s Story

So what collective story did the majority tell in their decision? Relying selectively on decades-old historical works written by non-Native Hawaiians long before the contemporary Native Hawaiian sovereignty movement, the Court invoked the familiar tale of how the white man “civilized” the Native savage.

The Court described, in patronizing and stereotypic language, how the Native Hawaiian people found “beauty and pleasure in their island existence.” But life was not “idyllic”; Hawai`i was rife with internecine warfare and its kings “could order the death or sacrifice of any subject.” Moreover, Hawaiians were “polytheistic.”

The decision characterized 19th century missionaries not as foreign cultural intruders, but as civilizers who “sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teaching.” The Court described the often hostile and greedy Western encroachment as a benign “story of increasing involvement of westerners in the political and economic affairs of the Kingdom.”

The Court referred to “tensions” between an “anti-Western, pro-Native bloc” and “Western business interests and property owners.” Then, turning historical events upside-down, the majority intimated that the overthrow was justified by Queen Lili`uokalani’s undemocratic actions. Her attempt to restore “monarchical control and [limit] the franchise to Hawaiian subjects” compelled “pro-democracy Americans” to seize control. In fact, Lili`uokalani was reacting to the white American businessmen’s imposition of a “bayonet constitution” in 1887, in which Native voters were largely disenfranchised by property voting requirements, while white voters and foreigners achieved grossly disproportionate political power.

The Court noted that the devastation of the indigenous Hawaiian people by the introduction of Western diseases was “no doubt” the initial cause of the “despair, disenchantment, and despondency” of the descendants of the early Hawaiian people. It

despair—the loss of political sovereignty, the confiscation of homelands, and the denigration of Native culture—that is, U.S. colonialism.

Eliminating Race to Claim Reverse Racism

The Court alluded to the “Chinese, Portuguese, Japanese, and Filipino” migrations to Hawai‘i, and how these immigrants faced, and overcame, discrimination. The implicit message is clear: These immigrants picked themselves up by their bootstraps, why haven’t the Native Hawaiians?

This argument ignores the crucial differences between people made American involuntarily through colonization and those who chose U.S. citizenship via immigration. But there is also a latent, perhaps more troubling, message that emerges from this discussion: Why, when naming Hawai‘i’s “immigrants,” did the Court cite communities of color but omit white Americans? Is it because the Court did not see white missionaries and businessmen as foreign settlers but rather as the natural heirs of Hawai‘i? In fact, the Court made no mention of the long history of white racism in Hawai‘i.

What emerges from the Court’s historical account is a simple story of “reverse racial discrimination” against Freddy Rice. In this view, Hawaiians had a rough go of it, as did immigrant groups, but the playing field now is pretty much leveled. U.S. colonization supposedly left no scars; therefore “privileges” for Native Hawaiians are not only undemocratic, they are illegal.

This, of course, is not the story Native Hawaiians tell. As they tell it, Native Hawaiians, through entities like OHA, are not seeking privileges or handouts. Nor are they seeking racial preferences. Rather they are asserting international human rights: not simply the right to equality, but the right to self-determination; not a right to monetary entitlements, but to reparations; not a right to “special treatment,” but to reconnect spiritually with their land and culture; not a right to participate in the U.S. polity, but a right to some form of governmental sovereignty.

While the battle surrounding *Rice v. Cayetano* is waged on the terrain of the here and now, its roots lie in a sanitized version of Hawaiian history inscribed by the Court into law. And people like Freddy Rice and his lawyers are poised now to legally deploy that version of history to the considerable detriment of the all Native people.

If Rice and his national political supporters succeed in legally dismantling Native programs, all of us will suffer huge practical and psychic costs. The U.S. professes fealty to both domestic civil rights and international human rights. It expresses a commitment to justice and, where injustice occurs, reparation.

But the *Rice* decision distorts civil rights, twisting a history of white racial colonization and privilege into present-day “equality” for Freddy Rice. It subverts the international human rights principles of self-determination and cultural development by invalidating democratically adopted multiracial commitments to Native Hawaiian self-governance. Most important, by selectively misreading history to frame its decision, the Supreme Court undermines the principle of justice through reparation and perpetuates the American racial myth that all is well as long as those in power say so. 📄fin

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